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Good Cents:
The RPCs and Fee Disputes

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In recent years, the Rules of Professional Conduct have emerged as a central focus of many fee disputes. The RPCs have come to play a key role in fee disputes because they play an equally key role in fee agreements. The Washington Supreme Court in *Valley/50th Ave., L.L.C. v. Stewart*, 159 Wn.2d 736, 743, 153 P.3d 186 (2007), summarized this essential point: "Attorney fee agreements that violate the RPCs are against public policy and unenforceable." In this column, we'll look at the developing role of the RPCs in fee disputes, the practical consequences to enforceability of fee agreements that violate the RPCs and practical steps to lower this risk.

Before we do, however, three qualifiers are in order.

First, although our focus will be on enforceability in the civil context, fee agreements that violate the RPCs expose lawyers to regulatory discipline as well. *In re Vanderbeek*, 153 Wn.2d 64, 85, 101 P.3d 88 (2004), and *In re Marshall*, 160 Wn.2d 317, 335, 157 P.3d 859 (2007), are examples of lawyers disciplined, in relevant part, for defective fee agreements and related collection efforts under those agreements.

Second, substantive contract law and fiduciary principles also play essential roles in the enforceability of fee agreements—particularly if the fee agreement involved has been modified unilaterally by the lawyer. *Ward v. Richards & Rossano, Inc.*, *P.S.*, 51 Wn. App. 423, 754 P.2d 120 (1988), remains a seminal decision on both points.

Third, fee agreements are subject to RPC 1.5(a)'s basic standard of reasonableness both when written and at collection. Therefore, even a fee agreement that complied with the RPCs when written may have become unreasonable at collection. In *Holmes v. Loveless*, 122 Wn. App. 470, 94 P.3d 338 (2004), for example, the Court of Appeals found that a fee arrangement had become unreasonable over time and refused to authorize its continued enforcement.

Emerging Role

The Supreme Court's broad statement from *Valley/50th Avenue* quoted at the outset has been applied to fee agreements of all stripes. *Valley/50th Avenue*, for example, involved a modification of an existing fee agreement to add security for payment of fees already accrued. In making its point, the Supreme Court in *Valley/50th Avenue* cited hourly fee (*Simburg, Ketter, Sheppard & Purdy, LLP v. Olshan*, 109 Wn. App. 436, 988 P.2d 467 (1999), *amended*, 33 P.3d 742 (2000)), flat fee (*Cotton v. Kronenberg*, 111 Wn. App. 258, 44 P.3d 878 (2002)) and contingent fee (*Belli v. Shaw*, 98 Wn.2d 569, 657 P.2d 315 (1983)) cases.

The RPCs' role as a touchstone for the enforceability of fee agreements should not be surprising because it weaves together three longstanding threads of Washington contract law.

First, contracts are subject to applicable statutory law. In *Dopps v. Alderman*, 12 Wn.2d 268, 273-74, 121 P.2d 388 (1942), the Washington Supreme Court quoted the United States Supreme Court on this unremarkable proposition:

> "'Laws which subsist at the time and place of the making of a contract, and where it is to be performed, enter into and form a part of it, as fully as if they had been expressly referred to or incorporated in its terms.'" (Citation omitted.)

The Washington Supreme Court noted in *Tanner Elec. Co-op. v. Puget Sound Power & Light Co.*, 128 Wn.2d 656, 674, 911 P.2d 1301 (1996), that this general principle applies to the interpretation of contracts as well: "Contractual language also must be interpreted in light of existing statutes and rules of law."

Second, parties to a contract may not generally avoid mandatory statutory law by private agreement. The Washington Supreme Court put it this way in *Grandview Inland Fruit Co. v. Hartford Fire Ins. Co.*, 189 Wn. 590, 605, 66 P.2d 827 (1937): "The purpose of statutes . . . would be defeated if their effect could be avoided by contract."

Third, it has long been an axiom of substantive contract law that, as the Court of Appeals summarized it in *Fluke Corp. v. Hartford Acc. & Indem. Co.*, 102 Wn. App. 237, 245, 7 P.3d 825 (2000): "If a contract violates public policy, the contract is void and unenforceable." The Supreme Court wrote in *Brown v. Snohomish County Physicians Corp.*, 120 Wn.2d 747, 753-55, 845 P.2d 334 (1993), that although the term "public policy" in this context is not defined precisely, it most certainly includes contracts that violate statutory law or the equivalent.

Practical Consequences

Fee agreements that violate the RPCs often result in three practical consequences. They are not mutually exclusive.

First, if a fee agreement is held unenforceable, then the lawyer or firm will (at most) be entitled to *quantum meruit* recovery for the reasonable value of the services provided (*see Barr v. Day*, 124 Wn.2d 318, 329-30, 879 P.2d 912 (1994) (discussing *quantum meruit* generally)). The range of discretion accorded the reviewing court—at least if a conflict is also involved—includes finding that the client received no benefit and the lawyer should collect nothing (*see Cotton v. Kronenberg*, 111 Wn. App. at 271-72). If a fee agreement is void, then any associated attorney lien (at least in the amount under the fee agreement) is also unenforceable (*see Gustafson v. City of Seattle*, 87 Wn. App. 298, 304, 941 P.2d 701 (1997)).

Second, if some of the fees involved have already been collected, disgorgement is a potential remedy. In *Eriks v. Denver*, 118 Wn.2d 451, 462, 824 P.2d 1207 (1992), the Washington Supreme Court observed: "The general principle that a breach of ethical duties may result in denial or disgorgement of fees is well recognized." The Washington Supreme Court in *Eriks*, which involved serious conflicts on the part of the lawyer who had collected fees notwithstanding the conflicts, quoted the United States Supreme Court for the precept that a disloyal agent is not entitled to fees from the principal:

> "' Where [an attorney] . . . was serving more than one master or was subject to conflicting interests, he should be denied compensation. . . .
>
> "'A fiduciary who represents [multiple parties] . . . may not perfect his claim to compensation by insisting that, although he had conflicting interests, he served his several masters equally well . . . Only strict adherence to these equitable principles can keep the standard of conduct for fiduciaries "at a level higher than that trodden by the crowd."'"
> (*Id.* (Citations omitted.))

Moreover, because disgorgement is simply a remedial device (rather than an independent claim) in this context, the Court of Appeals noted recently in *Behnke v. Ahrens*, 172 Wn. App. 281, 298, 294 P.3d 729 (2012), that neither causation nor damages is necessary to support a disgorgement order.

Third, if the defective fee agreement involved includes a business transaction with a client, then the resulting business transaction may also be void. *Valley/50th Avenue*, for example, focused on the enforceability of a fee arrangement modified midstream to incorporate a security interest for accrued fees. Addressing the particularly sensitive issue of lawyer-client business transactions generally, the Court of Appeals commented on the high bar imposed by RPC 1.8(a) in *Corporate Dissolution of Ocean Shores Park, Inc. v. Rawson-*

Sweet, 132 Wn. App. 903, 914, 134 P.3d 1188 (2006): "Placing this high burden on attorneys and those family members and associates who directly benefit from a transaction is necessary because of the suspect nature of attorney/client business transactions."

Practical Steps to Lower Risk

Given this landscape, three practical steps to lower risk stand out.

First, clearly document both the scope and financial terms of a representation with the client in writing at the beginning. As the Supreme Court put it in *In re Van Camp*, 171 Wn.2d 781, 805, 257 P.3d 599 (2011): "Even in those situations where no written fee agreement is required, in order to avoid confusion or later dispute, it is always wise to have one and, if a written fee agreement is used, it should be written in clear language that the client can understand."

Second, anticipate likely contingencies and build those into the fee agreement up front. Examples include the right to adjust hourly rates over time, an additional advance fee deposit payable at a specific interval before trial or an increased contingent percentage if a case goes up on appeal. If these events occur later, then they are simply agreed contingencies that came to pass rather than attempted modifications imposed unilaterally by the lawyer on the client.

Third, think long and hard about including a business transaction with a client in a fee agreement. Although permitted by the rules, anything that

Washington's appellate courts have labeled "prima facie fraudulent" (*see Corporate Dissolution of Ocean Shores Park, Inc. v. Rawson-Sweet*, 132 Wn. App. at 910 (compiling cases)) ought to be warning enough.

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